circumstances – we are not satisfied that those preparatory acts carried out by the respondent amount to grossly improper conduct in the discharge of his professional duty. It seems to us fair and just to describe his conduct in all the circumstances as improper but not grossly improper. We do not condone for a moment what the respondent did and we deprecate such conduct on his part. In our opinion, while no cause of sufficient gravity exists for disciplinary action under section 80 of the Act, such improper conduct undoubtedly merits a severe reprimand from the Committee under section 94(1) of the Act.

In the circumstances, we dismiss this application. We make no order as to costs.

Application dismissed.

Solicitors: *Murphy & Dunbar; Y.H. Cheong.*

UNITED OVERSEAS BANK LTD. v. SIN LEONG IRONBED AND FURNITURE MANUFACTURING CO. (PTE) LTD. & 5 ORS.

[A.C.J. (Chan Sek Keong J.C.) January 20, 1988]

[Singapore – Suit No. 657 of 1987]

Civil Procedure – Costs – Order as to fixed costs – Whether order correct – R.S.C. 1970, O. 59 r. 31(4) – Meaning of – Whether costs can be taxed costs on solicitor and client basis.

The plaintiffs granted certain loans to the first defendant. The loans were guaranteed by the second to the sixth defendants.

The plaintiffs brought an action to recover the loans. The plaintiffs also claimed costs on a solicitor and client basis. After applying for summary judgment, the plaintiffs were given leave to enter final judgment. However, they were only allowed fixed costs of $700 as provided in Appendix 2 to Order 59 of the Rules of the Supreme Court 1970. The plaintiffs appealed against the decision on costs.

Held, allowing the appeal: (1) the expression "unless the court otherwise orders" in Order 59 rule 31(4) gives the court the discretion to order taxed costs and not to order no costs;

(2) the plaintiffs were not invoking the power of the court to award them costs in accordance with the rules of court but in accordance with their contractual rights;

(3) neither Order 59 rule 2(2) nor rule 31(4) has the effect of curtailing the plaintiffs' right in the present action to solicitor and client costs as agreed by the defendants. Since the plaintiffs were exercising their contractual rights in recovering costs, Order 59 rules 2(2) and 31(4) were not relevant to the plaintiffs' claim;

(4) the costs of this action should be taxed on a solicitor and client basis.

Cases referred to:

(1) *Mansfield* v. *Robinson* [1928] 2 K.B. 353.
(2) *Sim Lim Finance Ltd.* v. *Pelandok Enterprises Pte. Ltd.* [1981] 1 M.L.J. 280.
(3) *Economic Life Assurance Society* v. *Usborne & Ors.* [1902] A.C. 147.
(4) *Ex parte Fewings* (1883) 25 Ch.D. 338.
(5) *London Borough of Ealing* v. *El Isaac* [1980] 2 All E.R. 548.

APPEAL AGAINST REGISTRAR'S DECISION.

R.E. Martin for the plaintiffs.
R.S. Wijaya for the defendants.

Cur. Adv. Vult.

Chan Sek Keong J.C.: This is an appeal by the plaintiffs against the decision of the Senior Assistant Registrar in refusing to award to them taxed costs on a solicitor and client basis.

The plaintiffs, who are bankers, commenced an action against the first defendant for repayment of $63,900.52 being the outstanding credit facilities granted to it and against the second to sixth defendants as guarantors. The plaintiffs also claim costs on a solicitor and client basis as part of their claim in their pleadings.

It is not disputed that the plaintiffs had agreed to grant banking facilities to the first defendant on terms as to costs of enforcement as follows:

"5. All costs, expenses, legal or otherwise connected with the execution, implementation and enforcement of the above line of credit shall be borne by your company."

It is also not disputed by the guarantors who had appeared that they had also agreed to pay the plaintiffs' costs of enforcement as follows:

"... all costs including solicitor and client costs charges and expenses which you may incur in enforcing or seeking to obtain payment of all or any of the moneys hereby guaranteed."

The writ was served on all the defendants other than the fifth defendant. Each of them entered appearance, following which the plaintiffs applied for summary judgment. The plaintiffs were given leave to enter final judgment against the said

defendants but were only allowed fixed costs of $700 as provided in Appendix 2 to Order 59 of the Rules of the Supreme Court.

The fixed costs were awarded on the following grounds as set out in the grounds of decision of the Senior Assistant Registrar:

(a) the court has no discretion to award taxed costs under Order 59 rule 31(4) which rule sets out the power of the court to award costs;

(b) if the court has a discretion to award taxed costs, he would not exercise it in the plaintiffs' favour as the claim was a simple claim with no special features which would warrant taxed costs;

(c) further, even if taxed costs were warranted, he would only order that costs be taxed on a party and party basis and not on a solicitor and client basis, bearing in mind the circumstances of this case;

(d) the rules of court have curtailed the contractual right of the plaintiffs to solicitor and client costs.

Before me, the plaintiffs have contended that the decision of the Senior Assistant Registrar was wrong on the following grounds:

(a) the court has a discretion under Order 59 rule 31(4) to award taxed costs in lieu of fixed costs;

(b) the Senior Assistant Registrar's refusal to exercise his discretion in favour of the plaintiffs was wrong as the reasons given in support of it did not touch upon the conduct of the plaintiffs in connection with these proceedings;

(c) in any case, the plaintiffs were entitled by contract to solicitor and client costs and the rules of court cannot take away such rights; the court therefore has no discretion in the matter.

The Senior Assistant Registrar's decision that the court does not have any discretion to award taxed costs was based on his interpretation of the words "unless the court otherwise orders" in Order 59 rule 31(4) read with Appendix 2 thereto.

The material portions of Order 59 rule 31 read as follows:

"31.(1) Subject to the foregoing rules and the following provisions of this rule, the scale of costs contained in Appendix 1 to this Order, together with the notes and general provisions contained in that Appendix, shall apply to the taxation of all costs incurred in relation to contentious business done on or after the coming into force of these Rules.

...

(4) Notwithstanding paragraph (1) costs shall, unless the court otherwise orders, be allowed in the causes to which Appendix 2 to this Order applies in accordance with the provisions of that Appendix".

The material portions of Appendix 2 read as follows:

" FIXED COSTS

PART I
COSTS ON JUDGMENT WITHOUT TRIAL FOR A LIQUIDATED SUM

1 The scale of costs set out in Part II of this Appendix shall apply in relation to the following cases if the writ of summons therein was issued and indorsed in accordance with Order 6 rule 2(1)(b), with a claim for a debt or liquidated demand, that is to say —

(a) cases in which the defendant pays the amount claimed within the time and in the manner required by the indorsement of the writ;

(b) cases in which the plaintiff obtains judgment in default of appearance under Order 13 rule 1, or under that rule by virtue of Order 79 rule 4, or judgment in default of defence under Order 19 rule 2, or under that rule by virtue of Order 79 rule 4;

(c) cases in which the plaintiff obtains judgment under Order 14 either unconditionally or unless that sum is paid into court or to the plaintiff's solicitors.

PART II
BASIC COSTS

Costs to be allowed in cases under the following subparagraphs of paragraph 1 of this Appendix:

(a)	(b)	(c)
$250.00	$450.00	$700.00"

The Senior Assistant Registrar interpreted the expression "unless the court otherwise orders" as giving a discretion to the court either to order no costs or fixed costs as provided in Appendix 2. There was no half-way house. He came to this conclusion on the ground that otherwise the concept of fixed costs would be rendered meaningless.

In my view, the expression "unless the court otherwise orders" gives the court the discretion to

order taxed costs and not to order no costs for the following reasons. Firstly, the power of the court is derived from section 18(2) of the Supreme Court of Judicature Act and the manner it is to exercise such power is set out in Order 59 rule 2(2) of the Rules of the Supreme Court 1970 which provides as follows:

"Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid."

The power of the court to award or to refuse costs to a party is derived from Order 59 rule 2(2) and not Order 59 rule 31. Where the court awards costs to a party, the general rule is that he is entitled to taxed costs. This is found in Order 59 rule 9(1) which provides as follows:

"Subject to this Order, where by or under these Rules or any order or direction of the court costs are to be paid to any person, that person shall be entitled to his taxed costs."

Therefore the words "unless the court otherwise orders" in Order 59 rule 31(4) adds nothing to the power of the court. To construe it as such is to give the court an unnecessary power.

Secondly, Order 59 rule 31 deals with the scale of costs to be applied in the taxation of costs; rule 31 does not give the court the power to order taxed costs which power is found in rule 9(1). Rule 31(4) qualifies rule 9(1) to the extent that in the cases prescribed in Appendix 2, a successful party is only allowed fixed costs in lieu of taxed costs, "unless the court otherwise orders". The expression must therefore refer to a discretion to order taxed costs and not no costs.

There is no rule of law or public policy which prohibits a borrower from agreeing to pay to a lender the lender's costs in taking steps to recover the loan on a solicitor and client basis. Indeed, there is no reason why a lender should put himself potentially out of pocket when making a loan on terms negotiated at arm's length. He is entitled to impose an indemnity as to his costs as one of such terms and where he has done so, it becomes unnecessary for him to rely on the discretionary power of the courts to award him costs. The principle that parties may by agreement oust the statutory discretion of a tribunal in awarding costs was upheld in *Mansfield* v. *Robinson*[1] where the parties had submitted their differences to arbitration and had agreed that the successful party should have costs on the High Court scale. The agreement was not communicated to the arbitrator who, in finding in favour of one party, awarded that each party should pay its own costs. The successful party sued on the agreement for costs and the court held that the agreement was valid and enforceable.

In the present case, the plaintiffs have sued the defendants for costs on a solicitor and client basis as part of their claim. They are entitled to such costs in contract. They are not invoking the power of the court to award them costs in accordance with the rules of court but in accordance with their contractual rights. There is no reason why they should not be entitled to such costs.

The Senior Assistant Registrar has also given, as one of the grounds of his decision, that rules of court might well have the effect of curtailing contractual rights. He relied on the decision of the learned Chief Justice in *Sim Lim Finance Ltd.* v. *Pelandok Enterprises Pte. Ltd.*[2] as an example of such a rule of court. I do not regard that decision as an authority that Order 42 rule 12 had the effect of curtailing the mortgagees' right to a rate of interest higher than the statutory rate. On the contrary, the learned Chief Justice decided that the mortgagees were still entitled to interest at the contractual rate under the mortgage. In his judgment, his Lordship after referring to the decision of the House of Lords in *Economic Life Assurance Society* v. *Usborne & Ors.*[3] said (at p. 280):

"Similarly, in the present case, the plaintiffs are entitled to retain their security until they were paid the principal sum and interest at 18 per cent (the covenanted rate) but, in my judgment, they were not entitled under the present application for leave to enter judgment in default of appearance to interest on the judgment debt exceeding the statutory rate of 8 per cent prescribed under Order 42 rule 12."

The issue in the *Sim Lim Finance*[2] case was whether the mortgagees were entitled to enter judgment against the mortgagors for the principal sum and interest at the contractual rate (which was higher than the statutory rate). Whether or not they were so entitled depended on whether the personal remedy on the covenant had merged in the judgment which carried interest at the statutory rate, and this was a question of construction of the covenant. If the covenant had been construed as an independent covenant, the mortgagees would have been entitled to sue on the covenant in accordance with its terms and effect: see *Ex parte Fewings*[4] where Fry L.J. said at p. 355:

"... a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment."

and *London Borough of Ealing* v. *El Isaac*[5] where Templeman L.J. (as he then was) said (at p. 551):

"It appears ... that merger has a very restricted operation. It does not, as appears from the *Usborne* case which I have just cited, apply to a security. It does not apply to what is said to be an independent covenant and in most mortgages and deeds of borrowing these days care is taken to make the covenant an independent covenant. So that, in practice, the number of times on which interest ceases to run from a date of judgment is very small. But on principle and on the authorities, it seems to me, the merger doctrine only applies to contracts and covenants."

In any case, I am of the view that neither Order 59 rule 2(2) nor rule 31(4) has the effect of curtailing the plaintiffs' right in the present action to solicitor and client costs as agreed by the defendants. As I have stated, the plaintiffs are not invoking the discretionary power of the court to award them costs but are suing to recover costs under an agreement. Therefore Order 59 rules 2(2) and 31(4) are not relevant to the plaintiffs' claim.

Accordingly, I allow the appeal and order that the plaintiffs do have the costs of this action to be taxed on a solicitor and client basis.

Order accordingly.

Solicitors: *Ramdas & Wong; R.S. Wijaya & Co.*

THE "EISHIN MARU"

BRIGHT NAVIGATION CO. LTD. v. "EISHIN MARU", OWNERS OF

[O.C.J. (Chan Sek Keong J.C.) January 20, 1988]

[Singapore – Admiralty in Rem No. 487 of 1986]

Civil Procedure – Statement of claim – Part of – Striking out of – Application for – Whether there was compliance with Order 18 rule 15(2) of Rules of Supreme Court 1970 – Breach of Order 18 rule 15(2) an irregularity – Writ can be amended – Application held over – Admiralty action in rem – R.S.C. 1970, O. 18 r. 15(2).

Shipping – Admiralty action in rem – Claim for beneficial ownership – Statement of claim – Part of – Striking out of – Application for – Whether there was compliance with Order 18 rule 15 of Rules of Supreme Court 1970 – Writ can be amended – Application held over.

The plaintiffs agreed to purchase a vessel from certain Japanese owners. They regarded the Japanese owners as the beneficial owners of the vessel. They filed an admiralty action *in rem* to, *inter alia,* enforce the agreement.

Thereafter, the plaintiffs filed their statement of claim claiming, *inter alia,* that they are the beneficial owners of the vessel. Meanwhile, a company called TJT claimed that they were the beneficial owners of the vessel. They made an application, as defendants, to strike out certain paragraphs and certain reliefs claimed in the statement of claim. They contended, *inter alia,* that the statement of claim did not comply with Order 18 rule 15(2) of the Rules of the Supreme Court 1970.

Held: (1) there was no doubt that the statement of claim does not comply with Order 18 rule 15(2). However, it does not necessarily follow from this that the offending claims must be struck out. A breach of Order 18 rule 15(2) is only an irregularity and if it can be remedied by an amendment to the writ there is no reason why the relevant paragraphs in the statement of claim should be struck out. To strike them out at this stage when the defect can be remedied will only lead to further delay in the resolution of this dispute. TJT could never be liable to the plaintiffs in respect of the said *in personam* actions whatever the position might be as regards the ownership of the vessel. These claims will fail against TJT irrespective of whether TJT have become the owners of the vessel. Therefore TJT had no interest whatever in these claims and no *locus standi* to object to the inclusion of these claims in the statement of claim;

(2) in the circumstances, this application should be held over to enable the plaintiffs to apply to amend the writ.

Cases referred to:

(1) *Sterman* v. *E.W. & W.J. Moore* [1970] 1 Q.B. 596.
(2) *The Lord Strathcona* [1925] P. 143.
(3) *Five Steel Barges* (1890) 15 P.D. 142.
(4) *The Elton* [1891] P. 265.
(5) *The August 8* [1983] 2 A.C. 450.

ADMIRALTY ACTION.

Steven Chong for the applicants/defendants.
S. Gunaseelan for the respondents/plaintiffs.

Cur. Adv. Vult.

Chan Sek Keong J.C.: This is an application by the defendants to strike out paragraphs 7, 8, 9 and 10 of, and certain reliefs in, the statement of claim on the grounds that (a) they contain claims in respect of causes of action not mentioned in the indorsement of the writ and (b) these claims being *in personam* actions may not be claimed in an admiralty action *in rem*.